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No. 07-9712

IN THE
Supreme Court of the United States

JAMES BENJAMIN PUCKETT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER

JONATHAN D. HACKER
GEOFFREY M. WYATT
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

LARS ROBERT ISAACSON
(*Counsel of Record*)
401 East Corporate Dr.
Suite 100
Lewisville, Texas 75057
(469) 948-4740

Attorneys for Petitioner

QUESTION PRESENTED

Whether a forfeited claim that the government breached a plea agreement is subject to the plain-error standard of Rule 52(b) of the Federal Rules of Criminal Procedure.

PARTIES TO THE PROCEEDING

Petitioner is James Benjamin Puckett, defendant-appellant below.

Respondent is the United States, plaintiff-appellee below.

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DECISIONS BELOW

Petitioner was sentenced by the District Court for the Northern District of Texas on September 11, 2006. The transcript of that proceeding is reproduced in the first volume of the Joint Appendix (J.A.) at 75a. The decision of the Fifth Circuit Court of Appeals is reported at 505 F.3d 377. That decision and the order of the Court of Appeals denying rehearing en banc are attached, respectively, as Appendix 1 and Appendix 2 to the petition for certiorari.

JURISDICTION

The court of appeals entered judgment on October 23, 2007, and denied en banc review on December 4, 2007. Pet. Apps. 1 & 2. A petition for certiorari was filed on March 3, 2008, and granted on October 1, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the U.S. Constitution provides in pertinent part: "No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."

The Sixth Amendment to the U.S. Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be . . . confronted with the witnesses against him . . . ."

Rule 52(b) of the Federal Rules of Criminal Procedure provides in pertinent part: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

INTRODUCTION

This case involves an admitted breach of a plea agreement by the Government at sentencing. Contrary to its own precedent, the practice of many other courts of appeals, and the teachings of this Court, the Fifth Circuit declined to remand the case to allow petitioner to withdraw the guilty plea the Government induced by means of a false promise. The court of appeals found it significant that petitioner's counsel had not objected when the Government violated the sentencing promise underlying the plea. Applying the plain-error doctrine of Rule 52(b) normally applicable to review of unpreserved errors, the court determined that petitioner failed to show that he could have secured a lesser sentence on remand and thus had not carried his burden under Rule 52(b) of proving that the breach "affected a substantial right." Pet. App. 1, at 5.

The court asked the wrong question. This Court's precedents—especially *Santobello v. New York*, 404 U.S. 257 (1971)—have firmly established that a plea agreement breach does not implicate the question whether the sentencing might have been different. The focus, instead, is on the effect of the breach on the underlying plea itself. The same precedents make clear that, when the prosecution violates a promise made in exchange for a guilty plea, the violation inherently negates the voluntariness of the plea, rendering it invalid and in violation of due process. And because the defendant's counsel cannot waive the defendant's right not to plead guilty—the defendant must personally waive the right, under this Court's precedents—it is of no moment that defense counsel did not object when the Government unilaterally changed the

conditions under which the defendant waived his right to a trial. Accordingly, the limited review available under Rule 52(b) for unpreserved errors has no application in this context—a breach that changes the conditions under which a guilty plea is entered *compels* reversal of the conviction, as a matter of due process, unless the defendant knowingly and personally accepts the new conditions. And even if Rule 52(b)'s conditions were applied, they would necessarily be satisfied because of the inherently prejudicial nature of the underlying constitutional violation at issue. Either way, the breach of a plea agreement necessarily prejudices the defendant's right to a personal, knowing waiver of the right not to plead guilty—a right that cannot be forfeited on the defendant's behalf through lack of an objection by counsel.

The judgment of the Fifth Circuit should be reversed.

STATEMENT OF THE CASE

1. On July 10, 2002, a grand jury in the Northern District of Texas returned an indictment charging petitioner James Puckett with violating 18 U.S.C. § 2113(a) and (d) (bank robbery) and 18 U.S.C. § 924(c)(1) (firearm enhancement). Puckett pled not guilty on August 1, 2002, J.A. 133a, thereby preserving important constitutional rights—the right against self-incrimination; the right to a trial by jury; and the right to confront his accusers. Trial was originally scheduled for September 23, 2002, but Puckett requested and received continuances while he and the Government attempted to reach a satisfactory plea agreement. *See* J.A. 9a-14a.

By September 3, 2003, Puckett and the Government had negotiated a mutually agreeable arrange-

ment. Puckett agreed to plead guilty to both counts of the indictment, and he expressly waived multiple constitutional and statutory rights: his right "to plead not guilty"; his right "to have a trial by jury"; his right "to confront and cross-examine witnesses and to call witnesses in his defense"; his right "against compelled self-incrimination"; and his right "to appeal his sentence" or "contest his sentence in any post-conviction proceeding." J.A. 134a-35a.[1] In exchange, the Government agreed "that [Puckett] has demonstrated acceptance of responsibility and [thereby] qualifies for a three-level reduction in his offense level" and to "request" that Puckett's sentence be placed "at the lowest end of the guideline level deemed applicable by the Court." J.A. 135a. The written plea agreement was filed in the district court on September 3, 2003.

Under USSG § 3E1.1(a), a two-level reduction for acceptance of responsibility can be granted at the Court's discretion, but a three-level reduction requires that the government file a motion under § 3E1.1(b) "stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently." The Government filed a § 3E1.1(b) motion on September 4, 2003, stating that Puckett had "assisted authorities in the investigation or prosecution of his

[1] Puckett reserved his right to appeal his sentence or contest it in a post-conviction proceeding on select grounds: ineffective assistance of counsel; "a sentence exceeding the statutory maximum punishment, an upward departure, or an arithmetic error at sentencing"; or the voluntariness of his plea. J.A. 54a-56a.

own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial." J.A. 57a-59a.

A probation officer filed a presentence report (PSR) in anticipation of sentencing in late 2003. J.A. 129a Consistent with the plea agreement, the PSR concluded that Puckett "has clearly demonstrated acceptance of responsibility for his offense" and that he "assisted the government in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial" and further permitting "the government and the Court to allocate their resources efficiently." J.A. 140a. In light of this finding, the PSR noted that, "[a]t the time of sentencing, the government will formally move the Court to grant the additional 1 level reduction," resulting in a three-level reduction for acceptance of responsibility. J.A. 140a-41a.[2]

Puckett's sentencing hearing was originally set for December 11, 2003, but was continued upon the discovery that Puckett had a "tennis ball-sized" brain tumor that required surgical removal. J.A. 86a. Sentencing was continued several times during the course of Puckett's medical treatment and subsequent examinations to determine his competency. Pet. App. 1, at 1. On November 8, 2005, Puckett moved to withdraw his plea on the grounds that his tumor had ren-

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[2] The probation officer filed an addendum to the PSR later in 2003, responding to objections made by Puckett to the PSR. Those objections and the addendum are not material here, but the addendum is reproduced at J.A. 193a-97a.

dered him incompetent to plead guilty and because he wished to raise a diminished-capacity or mental-defect defense at trial. Pet. App. 1, at 1; J.A. 27a. The district court denied that motion on March 20, 2006. J.A. 29a.

Pursuant to the trial court's request, a supplemental addendum to the PSR was filed in April 2006. The supplemental addendum amended the PSR's findings regarding acceptance of responsibility. According to the supplemental addendum, Puckett admitted assisting another man in a scheme to defraud the U.S. Postal Service in 2005. J.A. 199a. It accordingly found that acceptance of responsibility had not been demonstrated because Puckett "continued to be involved in criminal conduct after he entered his plea of guilty to the instant offense." J.A. 199a-200a.

In light of the new PSR determination, but without giving prior notice to defense counsel, the Government at sentencing reneged on its contractual promise—incorporated in the plea agreement—to urge a three-level reduction in Puckett's offense level. Instead the Government expressly "object[ed] to [Puckett] receiving any acceptance of responsibility levels." J.A. 79a. Puckett's counsel did not object on the specific ground that the Government had breached its promise in the plea agreement. He did argue, however, that the reduction should apply, noting that Puckett "did previously accept responsibility by entering a plea of guilty" and "has debriefed with a number of agents, at least four agents, in regard to other matters, and has consistently admitted his guilt." J.A. 79a. Puckett himself further stated that "I would never have entered a plea that I received no benefit from. I made that plea based on promises that I have documented here. . . .

You know, promise for sentence reductions. I don't think they have happened." J.A. 104a.

The Government has expressly acknowledged that the prosecutor's actions at sentencing were a plain breach of its promise and obligation under the plea agreement. Pet. App. 1, at 3; Gov. Cert. Resp. 7. Under the agreement, the Government expressly stated that "Puckett has demonstrated acceptance of responsibility and thereby qualifies for a three-level reduction in his offense level." J.A. 54a, ¶ 8. At sentencing, however, the Government not only withdrew its support of Puckett's request for a reduction, but actively argued against it. Left to be his only advocate, Puckett was substantially disadvantaged by this change in position. As the trial court noted, Puckett's criminal history "affects your credibility with the court" at sentencing. J.A. 102a, 116a.

The district court refused Puckett's request for a downward departure for acceptance of responsibility, citing the allegation of criminal conduct contained in the presentence report. J.A. 80a-81a. This resulted in a guidelines range of a 262- to 300-month sentence for Count 1; had the downward departure been granted, the guidelines range would have been between 188 and 235 months. J.A. 81a. The district court did note the government's recommendation that Puckett be sentenced at the low end of the guidelines range and stated that it "intend[ed] to follow that." J.A. 81a.

The district court sentenced Puckett to 262 months of imprisonment for Count 1 and a consecutive term of 84 months of imprisonment on Count 2. J.A. 117a.

2. Puckett appealed to the U.S. Court of Appeals for the Fifth Circuit. He argued, among other things, that under Fifth Circuit precedent, the Government's

breach of his plea agreement automatically entitled him to withdraw his guilty plea, even absent an express objection at sentencing based on the Government's breach.

The Fifth Circuit affirmed. The court of appeals panel acknowledged conflicting intra-circuit precedent regarding the proper application of plain-error review in the context of breached plea agreements. One line of cases held that an established breach of a plea agreement requires reversal even when no objection is made in the trial court, and without requiring a show of prejudice. *See*, *e.g.*, *United States v. Munoz*, 408 F.3d 222, 226 (5th Cir. 2005). Another line held that a breach "*can* constitute plain error, but will not always warrant reversal." Pet. App. 1, at 3. The court in this case followed the second line of cases, holding that because Puckett had "made no showing that, absent the government's recommendation, the district court would have disregarded his criminal conduct and granted the reduction for acceptance of responsibility," he had not shown plain error. Pet. App. 1, at 5. Puckett's petition for a rehearing en banc was denied. Pet. App. 2. This Court granted certiorari.

SUMMARY OF ARGUMENT

I. A prosecutor's breach of a plea agreement necessarily vitiates the voluntariness of the underlying plea and therefore inherently prejudices the most fundamental right a defendant possesses: the right to force the Government to prove its case through a trial by a jury of the defendant's peers. In a plea agreement, the defendant voluntarily agrees to waive his right to a trial, but only because the prosecution, in exchange, agrees to make particular sentencing recommendations. When the prosecution fails to adhere to that

bargain, it alters the conditions under which the defendant elected to waive his trial rights, thus rendering the waiver involuntary by definition, as this Court has repeatedly held. And because the right to a trial cannot be waived by counsel, it cannot be forfeited by counsel's silence either. The defendant must personally waive the right to a trial, as this Court has also repeatedly held, and when an earlier waiver is rendered involuntary by a prosecution breach that effectively imposes new terms on the agreement, only a new personal waiver by the defendant in light of those new terms can reestablish the voluntariness of the plea. Absent a new waiver, the plea must be withdrawn.

II. The plain-error doctrine of Rule 52(b) does not apply to the prosecution's violation of a plea agreement for two reasons. First, the Rule does not apply by its own terms. The Rule's language gives appellate courts authority to review, under limited circumstances, errors they would otherwise lack authority to review as forfeited. But some errors cannot be forfeited and must be reviewed on appeal. Because such review is mandated by the Constitution (or an applicable statute), it cannot be restricted by a rule of procedure.

Second, plain-error review under Rule 52(b) should not apply because the doctrine has no independent operative force in reviewing a plea agreement breach to which defense counsel did not object. A plea agreement breach cannot be "plain" to the court, which normally does not know the terms of the agreement. And this Court's precedents have already established that the breach directly affects the defendant's "substantial rights," by vitiating the voluntariness of his

plea. The Fifth Circuit thus erred in focusing on the effect of the breach on petitioner's *sentence*. The correct focus must be on the defendant's *plea*, as this Court has repeatedly held, and because a plea agreement breach falsifies the conditions under which the defendant waived his right to a trial, it necessarily affects his substantial rights. Finally, the effect on the fairness and integrity of the trial proceedings is equally clear. A prosecutor's failure to abide by promises made to induce a guilty plea casts serious doubt on the honor of the government and undermines public confidence in the integrity of the adversarial trial system. Ignoring a plea breach, and allowing an involuntary plea induced by misrepresentation to stand for lack of objection by counsel, only exacerbates the unfairness to the defendant caught in the middle between the prosecutor's breach and defense counsel's omission.

ARGUMENT

I. THE GOVERNMENT'S BREACH OF A PLEA AGREEMENT IS AN INHERENTLY PREJUDICIAL DEPRIVATION OF NONFORFEITABLE TRIAL RIGHTS

A. A Plea Agreement Is A Contractual Exchange Of Waivable But Nonforfeitable Trial Rights For Particular Government Action

Two inherent features of plea agreements govern the inquiry in this case.

The first is that a "plea bargain" is just that—a bargained-for-exchange. The defendant agrees to forgo his constitutional right to a trial, but only in exchange for (in this case, as in many others) a recom-

mendation by the Government for a particular sentence or sentencing range. It is only because "each side may obtain advantages when a guilty plea is exchanged for sentencing concessions" that plea bargains are deemed enforceable—the fact that the defendant receives the sentencing concession as consideration for forgoing trial makes the agreement "no less voluntary than any other bargained-for exchange." *Mabry v. Johnson*, 467 U.S. 504, 508 (1984); *see Brady v. Maryland,* 397 U.S. 742, 752 (1970) (emphasizing "mutuality of advantage" that constitutionally justifies plea bargains).

The second critical feature of plea bargains is that the rights the defendant gives up in the bargain are constitutional trial rights of the highest constitutional order. A "guilty plea is a grave and solemn act," *Brady*, 397 U.S. at 748, which implicates the waiver of multiple fundamental trial rights. "By entering a guilty plea, a defendant waives several constitutional rights that inhere in a criminal trial, including the right to trial by jury, the protection against self-incrimination, and the right to confront accusers." *Florida v. Nixon*, 543 U.S. 175, 187 (2004); *see Brady*, 397 U.S. at 748; *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *McCarthy v. United States*, 394 U.S. 459, 466 (1969). Because a waiver of any of those trial rights is valid only if is it voluntary and knowing, *see McCarthy*, 394 U.S. at 466, a guilty plea can validly waive such rights only if the guilty plea itself is "equally voluntary and knowing"; if it is not, "it has been obtained in violation of due process and is therefore void." *Id.*; *see Machibroda v. United States*, 368 U.S. 487, 493 (1962) ("A guilty plea, if induced by promises or threats which deprive it of the character

of a voluntary act, is void."); *see also Boykin*, 395 U.S. at 242 ("same standard" of voluntariness that governs waiver of fundamental trial rights governs guilty pleas).

The rights waived by a guilty plea include a right deemed so fundamental in our constitutional order—*viz.*, the right of a defendant to put the Government to its proof of guilt in a trial before a jury of his peers—that it "cannot be waived by the attorney alone." *Gonzalez v. United States*, 128 S. Ct. 1765, 1769 (2008). This Court has repeatedly described the right to plead not guilty as a "basic right[] that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client." *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988); *see Nixon*, 543 U.S. at 187 ("counsel lacks authority to consent to a guilty plea on a client's behalf"); *New York v. Hill*, 528 U.S. 110, 114 (2000) ("the defendant must personally make an informed waiver" of right to plead not guilty (citing *Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966))). The right to plead not guilty and go to trial, in short, is a *waivable* but not a *forfeitable* right. *See United States v. Olano*, 507 U.S. 725, 733 (1993) (distinguishing between "forfeiture" and "waiver"). It cannot be forfeited by mere inaction or omission, *see id.* ("forfeiture is the failure to make the timely assertion of a right"), but instead can be forgone only if the defendant personally declares his intention to waive it, and only then if the declaration of willingness to forgo trial is a "knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences." *Brady*, 397 U.S. at 748.

B. The Government's Breach Of A Plea Agreement Is An Inherently Prejudicial Violation Of The Defendant's Nonforfeitable Right To Not Plead Guilty

In a series of cases involving the validity and enforcement of plea agreements, this Court applied the forgoing principles to establish firmly that a guilty plea entered pursuant to a plea agreement is consistent with due process *only* to the extent the Government adheres to the promises it made to induce the plea. Because a breach of those promises *necessarily* vitiates the voluntariness of the guilty plea, such a breach inherently prejudices the defendant's fundamental, nonforfeitable right to plead not guilty.

In *Brady*, the Court established "the standard as to the voluntariness of a guilty plea," 397 U.S. at 755; *see Mabry*, 467 U.S. at 509 (*Brady* "state[s] the applicable standard" for voluntariness), and expressly included within that standard the Government's adherence to its promises as an essential condition of a properly voluntary plea:

> [A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), *misrepresentation (including unfulfilled or unfulfillable promises)*, or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e. g. bribes).

Brady, 397 U.S. at 755 (quotation omitted; emphasis added).

In *Santobello*, the Court applied *Brady*'s voluntariness standard to the "unfulfilled promises" *Brady* contemplated. In *Santobello*, the prosecutor entered into a plea agreement with the defendant in a case involving two gambling-related felony charges. In exchange for the petitioner's guilty plea to a lesser-included offense that carried a maximum sentence of one year, the prosecutor agreed not to make a recommendation at sentencing. 404 U.S. at 258. A second prosecutor, ignorant of these arrangements, recommended the maximum sentence at sentencing and thereby breached the agreement. *Id.* at 259. The defendant objected, but the trial court judge explained that the recommendation was immaterial: "I am not at all influenced by what the District Attorney says, so that there is no need to adjourn the sentence." *Id.*

The judge instead purported to rely entirely on the probation report, which revealed that Santobello, a convicted murderer, was "notorious" and "has an unbroken record of vicious criminality. He is not amenable to any restraint and is completely asocial. He should be among the last persons to be a legitimate object of leniency." *People v. Santobello*, 331 N.Y.S.2d 776, 778 (N.Y. App. Div. 1972) (Steuer, J., dissenting). The trial judge agreed with the probation report and sentenced Santobello to the maximum sentence of one year. 404 U.S. at 258.

Indeed, the report was so damning as to permit the State to argue in this Court that "Santobello must have appreciated that, in view of his criminal record, he could hardly have escaped incarceration under any circumstances." Resp. Br. 11, *Santobello*, No. 70-98 (U.S. 1971), *available at* 1971 WL 133497. And Santobello himself harbored no illusions about faring bet-

ter on remand—he freely acknowledged that he "would face a substantially stiffer sentence if permitted to go to trial on the original charges" and convicted on remand. Petr. Br. 12-13, *Santobello*, No. 70-98 (U.S. 1971), *available at* 1971 WL 133498. But he argued that the issue was "not whether or not the sentencing Court was justified in imposing a one year term of imprisonment, but rather whether the plea of guilty was obtained by virtue of a misrepresentation." *Id.* at 9.

The State admitted the breach on review before this Court but urged the Court to find it harmless, citing the trial judge's exclusive reliance on the report, rather than the sentencing recommendation.

The Court declined the invitation, and agreed with Santobello that the misrepresentation in the form of the unfulfilled promise required reversal *regardless whether the breach had any effect on the sentence below*. While obtaining guilty pleas through bargaining and inducements is "highly desirable" practice for many reasons, the Court explained, "all of these considerations presuppose fairness in securing the agreement between an accused and a prosecutor." 404 U.S. at 261. Thus, a "constant factor" in all guilty plea proceedings "is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise *must be fulfilled*." *Id.* at 262 (emphasis added). What is more, the Court held, the question "whether the sentencing judge would or would not have been influenced" by a different recommendation was simply irrelevant to the constitutional violation, *id.*, which was not about the sentence itself at all. The constitutional error was in-

stead the antecedent deprivation of Santobello's due process rights in inducing an involuntary plea—or, more precisely, a plea that effectively became involuntary when the prosecution later failed to adhere to its promise:

> On this record, petitioner "bargained" and negotiated for a particular plea in order to secure dismissal of more serious charges, but also on condition that no sentence recommendation would be made by the prosecutor. . . . [A]t this stage the prosecution is not in a good position to argue that its inadvertent breach of agreement is immaterial [to the judge's sentencing decision]. . . .

Id. Thus, reversal was required not because of any prejudicial error in the *sentence*, but because of "the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty." *Id.*

Finally, in *Mabry*, the Court reiterated that the voluntariness of a guilty plea depends on the Government's adherence to promises made to induce the plea. The breach in *Santobello*, the *Mabry* Court observed, "illustrates the point" that a guilty plea violates the Due Process Clause "when it develops that the defendant was not fairly apprised of its consequences." 467 U.S. at 509. Santobello had "pleaded guilty thinking he had bargained for a specific prosecutorial sentencing recommendation, which was not ultimately made." *Id.* That breach rendered his *underlying guilty plea*—not his subsequent sentence—invalid, the *Mabry* Court explained, because of the constitutional rule *Santobello* applied: "[W]hen the prosecution breaches its promise with respect to an executed plea agree-

ment, the defendant pleads guilty on a false premise, and hence his conviction cannot stand." *Mabry*, 467 U.S. at 509.

C. Because The Voluntariness Of The Defendant's Underlying Trial Waiver Is At Stake, The Lack Of An Objection By Counsel Is Irrelevant

For reasons that should by now be apparent, it is immaterial to *Santobello*'s constitutional rule whether the defendant's counsel raises an objection at sentencing when the prosecution violates the promise that induced the defendant's plea. As explained above, *supra* at 12, a defendant can plead guilty only if he *personally* makes a *voluntary* waiver of his right to go to trial, which requires him to understand all the circumstances and likely consequences of the plea. Thus, in *Henderson v. Morgan*, 426 U.S. 637 (1976), the Court held that a plea was involuntary, requiring reversal of the conviction as matter of due process, where the defendant was not advised as to a critical element of the crime for which he was charged, even though his counsel *did not object* to the omission of the element. *Id.* at 646. The lack of objection did not diminish the violation or restrict the standard of review; to the contrary, counsel's failure to ensure that the defendant accurately understood the circumstances and consequences of his plea helped *create* the constitutional error that rendered his plea involuntary and required reversal as a matter of law. *Id.*

The same principle must apply when the prosecution later unilaterally *changes* the circumstances and consequences of the plea, making a premise of the defendant's plea false. Just as with a constitutionally defective initial plea colloquy, a later breach of the

agreement underlying the plea necessarily vitiates the voluntariness of *initial* plea, as *Santobello* and *Mabry* make clear. The prosecutor's breach essentially substitutes new plea terms in the place of those agreed to by the defendant: instead of sentencing recommendation "X" in exchange for his trial waiver and guilty plea, the defendant will now receive recommendation "X+2," or "X+10," or whatever the prosecutor has decided—unilaterally—would be a better deal for the prosecution. But since there is no express, personal statement from the defendant agreeing to waive his trial rights under those new and different circumstances, the prior plea is no longer valid.

If the "new" plea terms are to be accepted by the defendant, effectively restoring the voluntariness of the underlying plea, another waiver of the right not to plead guilty is required, and that waiver necessarily must be the same personally expressed, knowing and voluntary waiver required for any plea. Defense counsel alone can no more accept an implicit new plea deal on the defendant's behalf, by simply failing to object to the prosecutor's breach at sentencing, than counsel can allow an involuntary plea to be entered in the first place by failing to object to an error in the plea colloquy that vitiates the voluntariness of the plea. If defense counsel cannot expressly waive a defendant's trial rights, counsel certainly cannot forfeit them by silence. *See Henderson*, 426 U.S. at 650 (White, J., concurring) ("[I]t is too late in the day to permit a guilty plea to be entered against a defendant solely on the consent of the defendant's agent—his lawyer. Our cases make absolutely clear that the choice to plead guilty must be the defendant's: it is *he* who must be informed of the consequences of his plea . . . ."). The

logic of the basic plea/waiver rule applies inexorably to the new plea terms effectively imposed by the prosecution: because "counsel lacks authority to consent to a [new] plea on a client's behalf," a "defendant's tacit acquiescence in the decision to plead [on new terms] is insufficient to render the plea valid." *Nixon*, 543 U.S. at 187-88.[3]

Requiring the defendant to adhere to new plea terms merely because his counsel failed to object also serves no valid policy objective of the plea bargaining process. This Court has emphasized the importance of finality in guilty pleas, *see*, *e.g.*, *United States v. Timmreck*, 441 U.S. 780, 784 (1979), but imposing a contemporaneous-objection requirement would do little to further the interest of finality. In the ordinary case, the contemporaneous-objection requirement advances finality by promoting immediate resolution when the error arises at trial. But where the prosecution breaches a promise underlying a guilty plea, and argues *against* a sentence reduction rather than *for* it, an objection comes too late. As *Santobello* specifically recognizes, the trial judge's assessment of the appropriate sentence is irretrievably affected by the prosecution's recommendation—the bell cannot be unrung. *Santobello*, 404 U.S. at 262-63. Little can be gained before the same sentencing judge by forcing the prose-

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[3] Certainly there is no greater practical basis for presuming that a defendant's own silence at sentencing reflects tacit acquiescence in new plea terms than there is for presuming that silence reflects acquiescence at an initial plea conference. Laypersons cannot be expected to understand the details of various Guideline ranges, levels, point reductions, and enhancements well enough to understand whether the prosecutor's statement adheres strictly to the terms of a plea agreement.

cutor to retract the breaching statement and to replace it with a conforming one. *See United States v. Corsentino*, 685 F.2d 48, 51 (2d Cir. 1982) ("[I]t is unlikely that any objection could have remedied the situation.").[4]

II. THE PLAIN-ERROR DOCTRINE OF RULE 52(b) DOES NOT APPLY TO THE VIOLATION OF THE DEFENDANT'S NONFORFEITABLE RIGHT TO NOT PLEAD GUILTY

Given the nature of the constitutional violation involved, Rule 52(b) does not apply—and cannot sensibly be applied—to appellate review of a prosecutor's plea agreement breach to which the defendant's counsel did not object. Not every error is necessarily subject to the plain-error doctrine. *See Nguyen v. United States*, 539 U.S. 69, 80-81 (2003). In *Nguyen*, this Court held that a defendant's failure to object to the unlawful composition of a judicial panel did not subject the error to review for plain error. *Id.* at 80-81. Even if the defendant had affirmatively *agreed* to the improper composition, the Court explained, the defect would have required reversal, rendering the defendant's lack of objection—the essential prerequisite for Rule 52(b)'s application—categorically irrelevant to appellate review. *Id.*

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[4] It also bears emphasis that prosecutors do not make a routine practice of breaching plea agreements—violating agreements with impunity would, of course, severely undermine prosecutors' ability to obtain pleas *ab initio*. "[C]oncerns for gamesmanship, which animate the requirement for contemporaneous objection, therefore dissipate in these cases in light of the rarity of the [conduct] at issue." *Nguyen v. United States*, 539 U.S. 69, 81 n.12 (2003).

The error in this case is different from the error in *Nguyen*. But like the error in *Nguyen*, the error here is not one susceptible to plain-error review under Rule 52(b), as shown below.

A. Rule 52(b)'s Language Does Not Address Errors For Which Reversal Is Already Required

To start, the Rule by its terms does not appear to address errors of the kind involved here and in *Nguyen*. Rule 52(b) provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." The Rule thus gives appellate courts affirmative (but limited) authority to consider errors *they could not otherwise consider*—i.e., errors forfeited by the defendant by lack of a timely objection. For that category of errors, Rule 52(b) gives appellate courts authority they would not necessarily possess in the absence of a rule or analogous judicial doctrine applied in the exercise of the federal courts' inherent supervisory authority.

Errors like the violation of a plea agreement, or the unlawful composition of a judicial panel under *Nguyen*, fall in a separate category—they are errors an appellate court is *already required* to consider, even absent authority conferred by the Rule. In *Nguyen*, the Court held that appellate review was effectively compelled by the congressional statute establishing the composition of the judicial panel. Here, the *Brady-Santobello-Mabry* line of cases makes clear that appellate review is compelled by due process, which requires an appellate court to reverse a conviction based on a guilty plea that lacked a personal, knowing and voluntary waiver of trial rights by the

defendant. Rule 52(b) thus gives the court no appellate review authority it does not already have—indeed, to the extent the Rule's conditions would prohibit the Court from reversing a conviction in federal court where the Constitution itself would require reversal in state court under the same circumstances, the Rule itself would violate the Constitution and could not be followed.[5]

B. The Multi-Part Test Of Plain Error Review Performs No Independent Work In Review Of Plea Agreement Breaches

The multi-part standard for conducting plain-error review under Rule 52(b) also need not be applied to review of a plea agreement breach because the standard does no substantive work in this context.

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[5] In *Johnson v. United States*, 520 U.S. 461 (1997), the Court asserted in dicta that "structural errors", which require reversal even absent specific prejudice to the defendant, are still subject to Rule 52(b) in the federal system when the error is not preserved. *Id.* at 466. The passage is dicta because the Court did not find the asserted error in that case—the failure to submit materiality to the jury—to be structural, *id.* at 469 ("It is by no means clear that the error here fits within this limited class of cases."), and the Court later affirmatively held that the error was *not* structural, *see Neder v. United States*, 527 U.S. 1, 8 (1999). What is more, the Court's later decision in *Nguyen* establishes that some structural errors are *not* subject to plain-error review, *Johnson*'s dictum notwithstanding. In any event, even if an unpreserved structural error is ordinarily subject to plain-error review, the error here is different because, while error-preservation may arguably be relevant to review of most structural errors, *see id.* at 34-35 (Scalia, J., dissenting), defense counsel's failure to object is *categorically irrelevant* to review of an involuntary guilty plea—since defense counsel simply cannot speak for the client in this narrow situation, counsel's failure to object is meaningless.

1. This Court has construed Rule 52(b) as imposing a four-part test that must be satisfied by a defendant seeking reversal on the basis of a trial error not preserved by a contemporaneous objection. *United States v. Olano*, 507 U.S. 725, 733-34 (1993). First, there must be an "error." *Id.* Second, the error must be "plain," which essentially means "obvious." *Id.* This requirement limits the Rule's application to an "error so 'plain' the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *United States v. Frady*, 456 U.S. 152, 163 (1982).

The latter two prongs address the effect of the error on the defendant and on the judicial proceedings, respectively. The third prong of the test requires that the error affect "substantial rights" of the defendant. *Id.* at 734. That inquiry "normally" requires a "specific analysis of the district court record . . . to determine whether the error was prejudicial," *id.*, but a specific inquiry into prejudice may not be required "in every case," *id.* at 735. In *Olano*, the Court noted two related types of errors that may not be subject to specific review of prejudice: "There may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome, but this issue need not be addressed. Nor need we address those errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice." *Id.* at 735.

The fourth prong, finally, reflects that the Rule is "permissive, not mandatory"—the court may "order correction, but is not required to do so." *Id.* at 735. In exercising that discretion, the appellate court should correct a plain error "if the error seriously affect[s] the

fairness, integrity or public reputation of judicial proceedings." *Id.* at 736 (quotation omitted).

2. That structure cannot be meaningfully applied to review of a prosecutor's breach of a plea agreement. To the extent it even makes sense to apply plain-error review to an error that can never be "plain" to the court, the structure does no meaningful work because, by the very nature of the constitutional violation already identified in this Court's precedents, the violation—once established—will *always* satisfy the requirements for reversal under the plain-error review standards.

a. The obviousness of the breach in this case is not contested here. Gov. Cert. Resp. 7, 12. But it is hardly clear, in any event, that it even makes sense to apply this factor to review of a plea agreement breach. As noted above, the obviousness of an error is relevant because Rule 52(b) is designed to permit review only of errors so obvious that either the court or the prosecutor should have noticed and corrected them even without objection from counsel. *Frady*, 456 U.S. at 163. But normally the court does not know the terms of the plea agreement, and thus cannot know whether there is any error to correct. And while the prosecutor obviously is or should be aware of the breach, one can hardly expect the prosecutor to notice and correct the error, since it is the prosecutor's own negligence or mendacity that produced the breach in the first instance.

The poor fit between the obviousness factor and review of a plea agreement breach underscores the disconnect between the essential purpose of the plain-error review doctrine—limiting review to errors susceptible to correction by the court below if timely no-

ticed—and review of a plea agreement breach, which the court cannot notice on its own, and which the court could not correct even if it did. Asking whether an error is so plain the court should have noticed and corrected it—the whole point of Rule 52(b)—is necessarily a futile and pointless exercise.[6]

b. Next, the adverse effect of a plea agreement breach on "substantial rights" could hardly be more plain. Indeed, that issue was settled conclusively in *Santobello*. The square holding of *Santobello*, as *Mabry* explains, is that "when the prosecution breaches its promise with respect to an executed plea agreement, the defendant pleads guilty on a false premise, and hence his conviction cannot stand." *Mabry*, 467 U.S. at 509. A plea agreement breach, in other words, *inherently* vitiates the voluntariness of the guilty plea itself, requiring reversal of the underlying conviction. That is true essentially by definition because, as explained above, the "mutuality of exchange" is precisely what makes a plea bargain voluntary and thus constitutionally legitimate. When the prosecution voids its side of the exchange, it necessarily voids the mutuality that made the plea voluntary. Accordingly, a plea agreement breach is within the

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[6] Assuming the obviousness factor is relevant to review of a plea agreement breach, however, normally any breach of a material condition of a plea will be as obvious as the breach here—if the condition is a material term of the agreement, and the prosecutor fails to adhere to it, the error should be obvious. In some cases, however, it may not be clear whether the prosecutor actually violated the agreement, in which case the error may not have been obvious enough to notice absent a timely objection. Thus an obviousness inquiry may serve some function in some cases, assuming this factor can sensibly be applied in this context at all.

category of errors "that should be presumed prejudicial." *Olano*, 520 U.S. at 735.

To be clear, a plea agreement breach is prejudicial *not* because of any possible effect on the judge's sentence, but because of its effect on the underlying plea. That is the lesson of *Santobello* and *Mabry*. The Fifth Circuit thus erred in this case—whether the plain-error doctrine nominally applies or not—by holding that the breach was not prejudicial because the judge would have denied Puckett the three-level reduction anyway. Puckett contends—and the Government has never disagreed or shown otherwise—that if the Government had not promised to seek a three-level reduction, he never would have entered the plea agreement. While the *Brady-Santobello-Mabry* rule assumes such prejudice as a categorical matter, the specific facts here illustrate and confirm the problem. Puckett initially entered a plea of not guilty. The promise that the Government ultimately breached was one of only two promises it made in the plea agreement and thus was clearly "part of the inducement or consideration" upon which the plea rested. *Santobello*, 404 U.S. at 262. Puckett explicitly confirmed this at sentencing: "I would never have entered a plea that I received no benefit from. I made that plea based on promises that I have documented here. . . . You know, promise for sentence reductions. I don't think they have happened." J.A. 104a. But for the Government's false promise, he never would have faced the denial of the reductions he was hoping for—he simply would have gone to trial. That route of course would have had its own significant risks, and may have made him even worse off, but that was his choice and his (nonforfeitable) right. Santobello faced the same prospect of a

worse fate from vitiation of his plea agreement, yet this Court did not hesitate to declare him inherently prejudiced, even while fully agreeing that judge was not influenced at all by anything the prosecutor said.

Santobello's holding that a plea agreement breach inherently prejudices the voluntariness of the plea itself, rather than the sentence, is consistent with other cases addressing the prejudice inquiry for unpreserved errors relating to a plea, but not affecting its fundamental voluntariness. *See United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004); *Hill v. Lockhart*, 474 U.S. 52 (1985). In *Hill v. Lockhart*, the petitioner sought habeas relief after pleading guilty to murder. *Id.* at 53-55. He alleged ineffective assistance of counsel "because his attorney had misinformed him as to his parole eligibility date." *Id.* at 54. Unlike this case, *Hill* did not involve a colorable claim that the guilty plea was involuntary or unknowing. *Id.* at 56. But the Court nonetheless allowed for the possibility of relief, *if* the petitioner could show that he suffered "prejudice" on account of the ineffective assistance. *Id.* at 58. That showing turned on whether the petitioner could show that his counsel's performance "affected the outcome of the plea process"—specifically, "that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59.

Dominguez-Benitez involved technical errors in the formalities of the plea colloquy mandated by Federal Criminal Rule 11. Because Rule 11 errors do not eviscerate the fundamental bargain underlying a guilty plea, unpreserved Rule 11 errors are subject to review for specific prejudice under Rule 52(b). *See Dominguez-Benitez*, 542 U.S. at 83 (explaining that

showing of prejudice was required in part because "the violation claimed was of Rule 11, not of due process"). But the prejudice that matters, the Court explained in *Dominguez-Benitez*, is the effect of the error on the defendant's decision to plead guilty: "[A] defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11, must show a reasonable probability that, but for the error, he would not have entered the plea." *Id.* at 83.

These cases confirm the rule stated or applied in *Brady*, *Santobello*, and *Mabry*: an error affecting the plea is prejudicial when it undermines the voluntariness of the plea, as is inherently true for the prosecutor's breach of a sentencing promise essential to the plea.

c. In addition to establishing the inherent prejudice of a plea breach, *Santobello* also conclusively resolves the fourth prong of plain-error review—whether the error "seriously affect[s] the fairness, integrity or public reputation" of the judicial proceeding. *Olano*, 507 U.S. at 732 (quotation omitted). Reversal was compelled, the *Santobello* Court explained, by "the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty." 404 U.S. at 262. *Santobello* recognizes that when the prosecution violates a promise made to induce a guilty plea, the violation casts serious doubt on the "the honor of the government" and undermines "public confidence in the fair administration of justice." *United States v. McQueen*, 108 F.3d 64, 66 (4th Cir. 1997); *see United States v. Fant*, 974 F.2d 559, 564 (4th Cir. 1992) (plea agreement violation "undermin[es] the credibility of

the criminal court system and the promises made by its officers"). Ignoring a breach for failure of defense counsel to object, thereby allowing the Government to benefit directly from wrongful or even fraudulent conduct by its officers, would only further erode confidence in the system. And while that system is adversarial, the public hardly expects the system to allow defendants to get caught between a prosecutor's misconduct and defense counsel's oversight. The fourth prong of plain-error review is thus easily satisfied by the prosecution's breach of any plea agreement.

* * * *

The foregoing analysis demonstrates that the multi-factor plain-error review doctrine has no independent operative force when applied to review of plea agreement breach to which defense counsel did not object. Because the doctrine serves no logical or substantive function in this context, it need not be applied—when the prosecutor fails to adhere to the promises made to induce a guilty plea, whether noticed by defense counsel or not, the conviction should be reversed and the case remanded to allow the defendant to make the informed and personal decision whether to plead guilty under the new conditions and circumstances created by the prosecutor's breach.[7]

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[7] Under Fifth Circuit precedent, the defendant victimized by the breach is allowed to elect the remedy appropriate to make his plea voluntary: withdrawal of the plea or specific performance of the plea in sentencing before a new judge. *See United States v. Saling*, 205 F.3d 764, 767-68 (5th Cir. 2000). That is the correct approach to the remedy, since the defendant himself must personally waive his right to a trial with knowledge of all the relevant circumstances. In any event, the question of the appropriate remedy is not before this Court.

Another way to reach the same resolution, of course, is to say that the plain-error review doctrine of Rule 52(b) *does* apply to review of a plea agreement violation to which defense counsel did not object, but that each of the doctrine's requirements is necessarily satisfied for any material breach of a plea agreement's terms. It is, in substance, a distinction without a difference—a guilty plea conditioned on a false promise "cannot stand," *Mabry*, 467 U.S. at 509, regardless whether defense counsel objects when the promise is abandoned and the plea becomes involuntary, and regardless whether the reviewing court walks through each step of plain-error review to reach that inevitable conclusion.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings consistent with Fifth Circuit precedent.

Respectfully submitted,

JONATHAN D. HACKER
GEOFFREY M. WYATT
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

LARS ROBERT ISAACSON
(*Counsel of Record*)
401 East Corporate Dr.
Suite 100
Lewisville, Texas 75057
(469) 948-4740

Attorneys for Petitioner

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